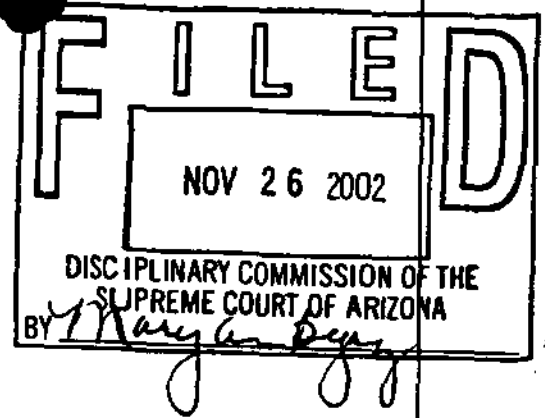


1 Jacqueline N. Schesno, Bar No. 016742
2 Staff Bar Counsel
3 State Bar of Arizona
4 111 West Monroe, Suite 1800
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7 **BEFORE THE DISCIPLINARY COMMISSION**
8 **OF THE**
9 **SUPREME COURT OF ARIZONA**

10 IN THE MATTER OF A MEMBER)
11 OF THE STATE BAR OF ARIZONA)

Case Nos. 01-0764, 01-1017
and 02-0302

12 **J. DOUGLAS MCVAY,**
13 **Bar No. 001777**

Respondent.

**TENDER OF ADMISSIONS
AND AGREEMENT FOR
DISCIPLINE BY CONSENT**

14
15 The State Bar of Arizona and Respondent, J. Douglas McVay, who is not
16 represented by counsel, enter into this Agreement and submit such pursuant to
17 Rule 56(a). Ariz.R.S.Ct., and the guidelines for discipline by consent issued by
18 the Disciplinary Commission of the Supreme Court of Arizona. Respondent
19 conditionally admits to a violation of Rule 42, Ariz.R.S.Ct., specifically ER 1.3,
20 1.4, 1.15(b) and 8.4(d), and agrees to censure, two-years probation and costs, as
21 more fully set forth herein, subject to review and acceptance by the Disciplinary
22 Commission.
23
24
25

FACTS

1
2 1. Respondent is, and was at all times relevant hereto, a member of the State Bar
3 of Arizona, having been admitted to the practice of law in Arizona on September
4 25, 1965.
5

6 **COUNT ONE (01-0764)**

7 2. Respondent represented Jason Warwick in his post conviction relief petition.
8

9 3. Respondent filed the post conviction relief petition.
10

11 4. The petition was denied.

12 5. Thereafter, Mr. Warwick requested Respondent file a motion for
13 reconsideration and file petition for review to the Court of Appeals.

14 6. Mr. Warwick did not hear from Respondent regarding such request. Mr.
15 Warwick wrote to Respondent and left him phone messages. Respondent failed to
16 respond to Mr. Warwick.

17 7. On June 8, 2001, the State Bar of Arizona sent Respondent a letter requesting
18 Respondent get in touch with Mr. Warwick.
19

20 8. Respondent did not get in touch with Mr. Warwick.

21 9. Respondent acknowledged his failure to correspond with Mr. Warwick after
22 the post conviction relief petition was denied.
23

24 10. Respondent requested more time from the Court of Appeals to file the petition
25 for review. The request was granted.

1 11. Thereafter, Respondent failed to file the petition for review and the case was
2 closed.

3
4 **COUNT TWO (01-1017)**

5 12. Respondent was hired in December 2000 to represent Connie Uhan in a
6 criminal charge against her.

7 13. Ms. Uhan paid Respondent \$5000.00 for his services.

8
9 14. At the end of the representation, Ms. Uhan did not feel Respondent earned the
10 \$5000.00 fee.

11 15. Therefore, Ms. Uhan advised the State Bar of Arizona that she believed
12 Respondent owed her an accounting and partial refund of the fee paid. The State
13 Bar of Arizona requested Respondent provide such.

14
15 16. Respondent did not provide an accounting as requested by the State Bar of
16 Arizona.

17
18 17. Respondent explained the \$5000.00 was a flat fee and therefore he did not
19 keep track of the time spent on the case. Respondent explained it was for this
20 reason he could not provide an accounting.

21 File 02-0302

22
23 18. File 02-0303 has been investigated and is incorporated in this agreement
24 without an entry of Probable Cause in an effort to reach a global resolution.
25

1 19. Respondent represented Francis Stone in his petition for post conviction
2 relief.

3 20. Mr. Stone requested Respondent give him with copies of documents from the
4 file. As of March 2002, the date Mr. Stone contacted the State Bar of Arizona,
5 Respondent had failed to provide such.
6

7 21. For the purpose of this consent, Respondent asserts the requested documents
8 were in the file, however the file was misplaced. Respondent provided the
9 documents to Mr. Stone once the file was located. For the purpose of this consent
10 agreement, the State Bar of Arizona does not dispute this assertion.
11

12 CONDITIONAL ADMISSIONS

13 Count One. Respondent conditionally admits his conduct violates Rule 42,
14 Ariz.R.S.Ct., specifically ER 1.3, ER 1.4 and ER 8.4(d).
15

16 Count Two. Respondent conditionally admits his conduct violates Rule 42,
17 Ariz.R.S.Ct., specifically ER 1.4, ER 1.15(b).
18

19 File 02-0302. Respondent conditionally admits his conduct violates Rule 42,
20 Ariz.R.S.Ct., specifically ER 1.4 and ER 1.16(d).
21

22 DISMISSED ALLEGATIONS

23 No alleged violations are being dismissed from Count One.

24 The alleged violation of ER 1.3 is being dismissed from Count Two, as the
25 State Bar of Arizona conditionally admits it cannot prove Respondent failed to

1 represent Ms. Uhan diligently. The alleged violation of ER 8.1(b) and Rule 51 are
2 being dismissed as the State Bar of Arizona conditionally admits it cannot prove
3 Respondent intentionally failed to provide the requested information.
4

5 Count Three in its entirety is being dismissed in exchange for Respondent
6 entering into this agreement. The allegations in Count Three would have helped
7 the State Bar of Arizona prove the allegations asserted in Counts One and Two at
8 a discipline hearing. However, the allegations in Count Three are not properly
9 considered in the context of a Consent Agreement.
10

11 Count Four alleges prior discipline. Prior discipline is set forth as a
12 recognized aggravating factor, pursuant to ABA Standard 8.3(b) and 9.22(a), in
13 the Joint Memorandum.
14

15 SANCTION

16 Respondent and the State Bar of Arizona agree that on the basis of the
17 conditional admissions contained herein, the appropriate sanctions are as follows:

- 18 1. Respondent shall receive a Censure for his conduct.
- 19 2. Respondent shall be placed on Probation for a period of two (2) years.

20 The terms of probation shall include:

- 21 a. Respondent will participate in Law Office Management Assistance
22 Program (LOMAP). Respondent will meet with the LOMAP
23 Director who will determine the appropriate terms of LOMAP and
24 Respondent will enter into a Memorandum of Understanding (MOU)
25 with the State Bar of Arizona.

1 b. As part of the LOMAP program, Respondent shall have a Practice
2 Monitor.

3 c. If the Practice Monitor determines Respondent is in complete
4 compliance with all the terms/conditions of probation and the MOU
5 and the Director of LOMAP concurs, Respondent's probation may
6 be terminated early, but in any event the term of probation shall be
7 for no less than one year.

8 3. Respondent shall pay the costs incurred in these disciplinary proceedings.

9 Attached hereto is a statement of costs and expenses incurred by the State Bar of
10 Arizona in these disciplinary proceedings.

11 4. There is no restitution to be repaid. With respect to Count One, Respondent
12 represented Mr. Warwick as part of a government contract. Therefore, Mr.
13 Warwick did not pay Respondent any money. With respect to Count Two,
14 Respondent asserts he earned the money paid to him by Ms. Uhan. Respondent
15 detailed the work he performed and the State Bar of Arizona does not believe it can
16 prove Ms. Uhan is entitled to a refund of any fees. With respect to File 02-0302,
17 Respondent represented Mr. Stone as part of a government contract. Therefore, Mr.
18 Stone did not pay Respondent any money.

19 In the event Respondent fails to comply with his probation, and information
20 thereof is received by the State Bar, Staff Bar Counsel shall file a Notice of Non-
21 Compliance pursuant to Rule 52 (6) (C), Ariz.R.S.Ct. The Hearing Officer shall
22 conduct a hearing at the earliest practical date, but in no event less than thirty (30)
23 conduct a hearing at the earliest practical date, but in no event less than thirty (30)
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25 conduct a hearing at the earliest practical date, but in no event less than thirty (30)

1 days following receipt of said notice. The Hearing Officer shall determine
2 whether the terms of probation have been breached and, if so, recommend
3 appropriate action and response for such breach. If there is an allegation that
4 Respondent failed to comply with any of the foregoing terms, the burden of proof
5 shall be on the State Bar to prove non-compliance by a preponderance of the
6 evidence.
7

8 Respondent conditionally admits that he has engaged in the conduct set
9 forth above and the rule violations indicated, in exchange for the form of discipline
10 as set forth above.
11

12 Respondent, by entering into this agreement, waives his right to a formal
13 disciplinary hearing that he would otherwise be entitled to pursuant to Rule 53 (c) 6,
14 Ariz.R.S.Ct., and the right to testify or present witnesses on his behalf at a hearing.
15 Respondent further waives all motions, defenses, objections, or requests which he
16 has made or raised, or could assert hereinafter, if the conditional admissions and
17 stated form of discipline are approved. Respondent is not represented by counsel in
18 these proceedings.
19

20 This Tender of Admissions and Agreement for Discipline by Consent will
21 be submitted to the Disciplinary Commission for review. Respondent realizes that
22 the Disciplinary Commission may request his presence at a hearing for presentation
23 of evidence and/or argument in support of this agreement. Respondent further
24 recognizes that the Disciplinary Commission may reject this agreement and the
25 Arizona Supreme Court may accept or reject the Disciplinary Commission's


1 recommendations. If the agreement is rejected at any time, Respondent's
2 conditional admissions are withdrawn.

3 **This agreement, with conditional admissions, is submitted freely and**
4 **voluntarily and not under coercion or intimidation. I am aware of the Rules**
5 **of the Supreme Court with respect to discipline and reinstatement.**

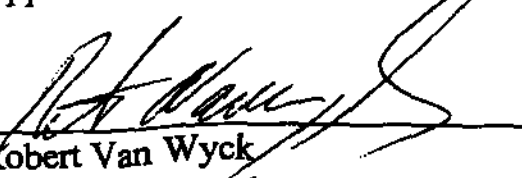
6
7 DATED this 26th day of November, 2002.

8
9
10 
11 J. Douglas McVay
12 Respondent

13
14 DATED this 26th day of November, 2002.

15
16 
17 Jacqueline N. Schesno
18 Staff Bar Counsel

19
20 Approved as to form and content.

21 
22 Robert Van Wyck
23 Chief Bar Counsel

24 Original filed this 26th day of
25 November, 2002 with:

1 Disciplinary Clerk of the Supreme Court
2 Certification and Licensing Division
3 1501 W. Washington, #104
4 Phoenix, Arizona 85007-3329

5 Copy of the foregoing was mailed this
6 26th day of November 2002 to:

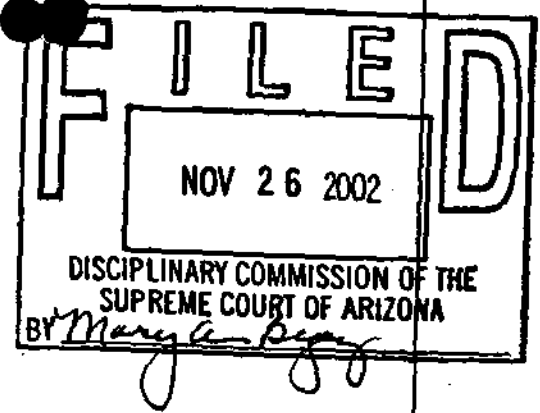
7 J. Douglas McVay
8 207 West Clarendon Avenue
9 Suite 3
10 Phoenix, Arizona 85013
11 Respondent

12 Copy of the foregoing was hand delivered this
13 26th day of November 2002 to:

14 Linda Perkins
15 Lawyer Regulation Records Manager
16 State Bar of Arizona
17 111 West Monroe Street, Suite 1800
18 Phoenix, Arizona 85003

19 by: Lynn Boardman
20 JNS
21
22
23
24
25

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13 **Bar No. 001777**

14 **Respondent.**

JOINT MEMORANDUM IN
SUPPORT OF AGREEMENT
FOR DISCIPLINE BY
AGREEMENT

15 The State Bar of Arizona and Respondent, J. Douglas McVay, who is not
16 represented by counsel, hereby submit their Joint Memorandum in support of the
17 Agreement for Discipline by Consent filed contemporaneously herewith.

18 Respondent conditionally admits to a violation of Rule 42, Ariz.R.S.Ct.,
19 specifically ER 1.3, 1.4, 1.15(b) and 8.4(d), and agrees to censure, two-years
20 probation and costs, as more fully set forth herein, subject to review and
21 acceptance by the Disciplinary Commission.
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In arriving at the agreed upon sanction, consideration was given to Rule 42 Ariz.R.S.Ct., specifically ER 1.3, 1.4, 1.15(b), 1.16(d) 1.15 and 8.4(d). Consideration was also given to the ABA Standards for Imposing Lawyer Sanctions ("Standards"), particularly Standards 4.13, 4.43, 8.3(b), 9.2 and 9.3. Consideration was also given to applicable case law.

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10 "In determining the appropriate sanctions, the Court considers the American
11 Bar Association's Standards for Imposing Lawyer Sanctions a suitable guideline,"
12 In re Rivkind, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1009). The Commission
13 uses that guideline, as well," In re Kaplan, 179 Ariz. 175, 177, 877 P.2d 274
14 (1994).

16 || Standard 4.13 states,

Reprimand (censure in Arizona) is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

In the present case, Respondent failed to provide his client, Ms. Uhan, with an accounting of the funds paid to Respondent. Additionally, Respondent failed to return documents to another client, Mr. Stone. The sanction of censure is appropriate under the circumstances.

1 Standard 4.42 states,

2 Suspension is generally appropriate when a lawyer
3 engages in a pattern of neglect and causes injury or
4 potential injury to a client.

5 Standard 4.43 states,

6
7 Reprimand (censure in Arizona) is generally appropriate
8 when a lawyer is negligent and does not act with
9 reasonable diligence in representing a client, and causes
injury or potential injury to a client.

10 In the present case, Respondent engaged in a pattern of neglect.
11
12 Respondent did not diligently communicate with three of his clients. Respondent
13 did not respond to the efforts of Mr. Warwick to communicate with him.
14 Respondent did not communicate to Ms. Uhan as to how he accounted for the
15 funds paid to him. Respondent did not communicate with Mr. Stone as to the
16 status of the return of documents. While it is arguable 4.42 is the applicable
17 Standard, a censure, pursuant to Standard 4.43 is not outside the reasonable range
18 of sanctions when all the Standards and case law are analyzed. The sanction of
19
20 censure is appropriate under all of the present circumstances.
21

22 Standard 8.3(b) states,

23 Reprimand (censure in Arizona) is generally appropriate
24 when a lawyer has received an admonition for the same
25 or similar misconduct and engages in further acts of
misconduct that cause injury or potential injury to a
client, the public, the legal system or the profession.

1
2 In file 97-2419, Respondent received an Informal Reprimand for violations
3 of Rule 42, Ariz.R.S.Ct., specifically ER 1.3 and 1.4. This provides further
4 support that the sanction of censure is appropriate in this case.
5

6 After the Respondent's misconduct is established, the Standards indicate
7 aggravating and mitigating circumstances may be considered in determining the
8 appropriate sanction.
9

10 An analysis of the aggravation/mitigation factors support the imposition of
11 a censure in this matter.

12 A review of Standard 9.22 indicates the following aggravating factors are
13 present:
14

15 9.22 (a) prior disciplinary offenses. Previously, Respondent was disciplined
16 for violations of ER 1.3 and ER 1.4, similar to the conduct in the present case.

17 9.22 (d) multiple offenses. The present case involves three separate cases.

18 9.22 (i) substantial experience in the practice of law. Respondent was
19 admitted to practice law in Arizona in 1965.
20

21 A review of Standard 9.32 indicates the following mitigating factors are
22 present:
23
24
25

1 9.32 (b) absence of a dishonest or selfish motive. There is no evidence that
2 Respondent acted selfishly or dishonestly and Respondent did not personally gain
3 from his actions.
4

5 9.32 (e) full and free disclosure to a disciplinary board or cooperative
6 attitude toward proceedings. Respondent has been cooperative with the State
7 Bar of Arizona throughout these proceedings.
8

9 A review of the aggravating and mitigating factors support the
10 presumptive sanction of a censure as the appropriate sanction in this case.
11

12 PROPORTIONALITY

13 In Matter of Mybeck, 176 Ariz. 310, 861 P.2d 595 (1993), Mybeck violated
14 of ER 1.3 and ER 1.4 by failing to perform services and failing to communicate
15 with his clients. For his conduct, Mybeck was censured and placed on two years
16 probation. The terms of probation included participation in LOMAP and a practice
17 monitor.

18 In the instant case, Respondent failed to perform the service of filing a
19 petition for review for Mr. Warwick and failed to communicate with all three
20 clients. The conduct in this case is similar to that in Mybeck. Therefore, in this
21 case, the sanction of a censure, payment of costs and two years probation, with
22 terms of LOMAP and a practice monitor, is appropriate.

23 In Matter of Augenstein, 177 Ariz. 581, 870 P.2d 399 (1994), Augenstein
24 violated ER 1.2, ER 1.3, ER 1.4 and ER 1.15 by failing to abide by his client's
25 wishes, failing to act with reasonable diligence and failing to adequately

1 communicate with clients. For his conduct, Augenstein was censured and placed
2 on two years probation, including participation in the LOMAP program.

3 In the present case, Respondent failed to perform services for Mr. Warwick,
4 failed to provide and accounting to Ms. Uhan and failed to communicate with all
5 three clients. Therefore, in this case, the sanction of a censure, costs and two years
6 probation is appropriate.

7 In Matter of Chard, 180 Ariz. 1, 881 P.2d 333 (1994), Chard violated ER
8 1.1, ER 1.3 and ER 1.4 by failing to adequately prepare for trial, failing to inform a
9 client of his billing methods and failing to communicate with his client. Chard was
10 censured and placed on two years probation.

11 Here, Respondent failed to perform the service of filing a petition for review
12 for Mr. Warwick, failed to provide and accounting to Ms. Uhan, failed to
13 communicate with all three clients and failed to return documents to Mr. Stone.
14 For those reasons, the sanction of a censure and two years probation is appropriate
15 in this case.

16 In Matter of Gamble, 180 Ariz. 145, 882 P.2d 1271 (1994), Gamble violated
17 ER 1.3 and ER 1.4. For such, Gamble was censured and placed on probation for
18 two years, including LOMAP.

19 In the case at bar, Respondent engaged in similar conduct as in Gamble.
20 Therefore, a similar sanction should be imposed. Respondent in this case should be
21 censured, be required to pay costs and placed on two years probation. The terms of
22 probation should include participation in LOMAP and a practice monitor.

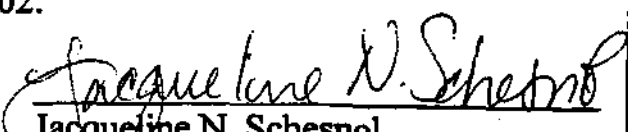
CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary Commission to determine the appropriate sanction, the State Bar and Respondent assert the objectives of discipline will be met by the imposition of the proposed sanction of a censure, costs and two years probation.

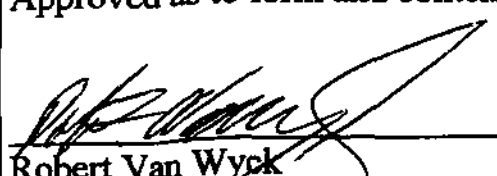
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Respondent

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Staff Bar Counsel

Approved as to form and content:


Robert Van Wyck
Chief Bar Counsel

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